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No. 793

In the Supreme Court of the United States

OCTOBER TERM, 1945

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

WARNER HOLDING COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Chester Bowles, Price Administrator of the Office of Price Administration, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled case entered on October 31, 1945, affirming a decision of the District Court of Minnesota.

OPINIONS BELOW

The opinion of the District Court (R. 25–36) is reported in 60 F. Supp. 513. The opinion of the Circuit Court of Appeals (R. 66–71) is reported in 151 F. 2d 529.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 31, 1945 (R. 71-72). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 25, 1925.

QUESTION PRESENTED

Whether the power granted the court under Section 205 (a) of the Emergency Price Control Act to issue an injunction or "other order" to enforce compliance with the Act, where a person has engaged in acts constituting a violation thereof, includes the power to order restitution of overcharges made by a seller or landlord.

STATUTE INVOLVED

The statute involved is the Emergency Price Control Act of 1942, (56 Stat. 23, 33; 50 U. S. C. App. 901 et seq. as amended by the Stabilization Extension Act of 1944, 58 Stat. 640, 50 U. S. C. App. 901 et seq.).

Pertinent provisions of the statute are Sections 4 (a), 205 (a), and 205 (e).

Section 4 (a) provides:

> It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or

to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (2) or section 205 (f); or to offer, solicit, attempt, or agree to do any of the foregoing.

Section 205 (a) provides:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Section 205 (e) prior to amendment provides:

> If any person, selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the

amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or prices and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States.

Section 205 (e) as amended by the Stabilization Extention Act of 1944, Pub. Law No. 383, 50 U. S. C. App. Sec. 925 (e) provides:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor

more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent

jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

STATEMENT

Respondent, Warner Holding Company, is the owner of eight apartment buildings in the City of Minneapolis, containing an aggregate of approximately 280 dwelling units. Between November 1, 1942 and June 29, 1943 (the date on which a temporary injunction was issued herein), it consistently demanded and received rents in excess of those permitted by the applicable maximum rent regulations issued under the Emergency Price Control Act.[1] (R. 26–32, 36–37.) Respondent having refused to comply with the Act and the regulations, petitioner brought this action to restrain the respondent from continuing to violate them and to compel respondent to refund to its tenants the excess of the rents which it had collected over the legal maximums. (R. 2–6.)

The district court granted an injunction against respondent's continued violation of the Act and

[1] Maximum Rent Regulation 53 (7 F. R. 8596) and the Rent Regulation for Housing (8 F. R. 7322). The former regulation became effective November 1, 1942, and continued in effect until June 1, 1943, when it was superseded by the latter regulation.

regulation but declined to order restitution (R. 35, 41). The Circuit Court of Appeals affirmed the judgment (R. 71).

Both the district court (R. 35) and the Circuit Court of Appeals (R. 70–71) rested their decisions on the ground that they were without power to order restitution.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred in holding that Section 205 (a) does not empower the court to grant restitution of overcharges as a means of enforcing compliance with the Act.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is squarely in conflict with a subsequent decision of the Sixth Circuit Court of Appeals in *Bowles* v. *Skaggs*, 151 F. 2d 817, rehearing denied December 10, 1945. The petition for rehearing in the *Skaggs* case called attention to the decision of the Eighth Circuit in the instant case; the Sixth Circuit denied the petition, although it expressly stated that the Eighth Circuit's decision "reaches a conclusion in conflict with ours."[1] In the *Skaggs* case the Sixth Circuit held that the district court in the exercise of its traditional powers could in its discretion order restitution; that there is

[1] The opinion denying a rehearing in the *Skaggs* case, which is not yet reported, is printed in the Appendix to this petition.

nothing in Section 205 (a) which reflects an intent on the part of Congress to restrict such powers; that, on the contrary, it must have been the intent of Congress to afford full opportunity to a court of equity to treat enforcement proceedings under Section 205 (a) of the Act in such a way as would be most responsive to the needs of the public in preventing inflation; and "that to deny the Administrator power to act in cases where, as here, restitution rather than a prohibitory injunction is the only practical remedy, would be to subvert the purposes of the Act."

The decision of the court below is also inconsistent with the decision of the Circuit Court of Appeals for the Second Circuit in *Walling* v. *O'Grady*, 146 F. 2d 422, where restitution was ordered as ancillary to injunctive relief under the Fair Labor Standards Act.[3]

2. The decision below involves a question of importance to the due administration and enforcement of the Emergency Price Control Act. If allowed to stand it will mean that a remedy, which is urgently needed in the enforcement of

[3] The attempt of the court below to distinguish the *O'Grady* case on the ground that Section 17 of the Fair Labor Standards Act (52 Stat. 1069, 29 U. S. C. 217) authorizes the federal district courts broadly, "to restrain violations", cannot be sustained, since the language of the Emergency Price Control Act authorizing the Administrator to apply for an order "enjoining such acts * * *, or for an order enforcing compliance * * *" is even broader in scope.

the Act, and which was clearly intended to be available, may no longer be resorted to. Section 205 (a) of the Act authorizes any court of competent jurisdiction, upon application of the Administrator, to issue, not only an injunction, but "an order enforcing compliance" with the Act. The Section twice grants separate authority to enjoin and to issue other orders, thereby clearly indicating that the power was to do more than enjoin when other types of orders were necessary to bring about compliance. And compliance is not achieved when a violator retains the amount he has overcharged, even though he be restrained from violating in the future. As the Senate Committee on Currency and Banking said, the section gives the courts "jurisdiction to issue *whatever* order to enforce compliance is *proper in the circumstances of each particular case*" (Senate Report 931, 77th Cong. 2d Sess., page 10, italics supplied). In short, the clearly manifested intention of Congress was that the term "other order" as used in Section 205 (a) should be construed in its broadest sense. So construed it plainly authorizes the issuance of affirmative orders enforcing compliance by compelling the undoing of past violations as well as the prevention of future violations.

The holding of the court below that restitution could not be ordered at the suit of the Administrator because the statutory right to recover dam-

ages under Section 205 (e) of the Act (as originally enacted) was vested exclusively in the purchaser, is not supported either by the language of the Act or by its legislative history. The right to compel restitution is wholly separate and distinct from the right granted to purchasers and tenants to recover damages under Section 205 (e). As the Circuit Court of Appeals for the Sixth Circuit said in *Bowles* v. *Skaggs*, 151 F. 2d 817, 821, "An order of restitution is not a judgment for damages or for penalties. It compels compliance and is restoration of the status quo which falls within the recognized power of a court of equity. * * * The Administrator acts in the public interest—the purchaser in his own. The remedies are not irreconcilable." This distinction between remedies created by statute for the vindication of public rights at the suit of a public officer or agency and those provided for the redress of private wrongs at the suit of injured parties, has frequently been recognized by this Court. (See, e. g., *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48, 49. It is a distinction which the court below completely ignored.

The remedy given tenants and consumers by the Act is inadequate to protect the public interest. Purchasers and tenants often are un-

willing either to assume the cost and risk of litigation, or to incur the hostility of a seller and landlord upon whom they are dependent, as the case may be, for the further supply of goods or peaceful enjoyment of the premises. The result is that the remedy granted them would be found wanting to protect the public interest in that large area of cases where strict enforcement is most gravely needed.

Nor does the fact that Section 205 (e) was amended by the Stabilization Extension Act of 1944, so as to permit the Administrator to sue to recover damages for overcharges in cases where the tenant or purchaser fails to sue within 30 days, either indicate that the remedy of compelling restitution did not previously exist or operate to withdraw that remedy. As shown above, Section 205 (a) was amply broad enough to authorize the court to compel restitution at the suit of the Administrator. Cf. *Walling* v. *O'Grady*, 146 F. 2d 422 (C. C. A. 2nd). Section 205 (a) was left intact and there is nothing either in the amendment to Section 205 (e) or in its legislative history which in any way indicates an intention on the part of Congress to restrict the power of the courts thereunder. It is well settled, moreover, that the fact that a legal remedy is subsequently made available by statute in no way restricts the power of a court of equity to grant

relief which it had previously been authorized to grant. (Cf. *American L. Ins. Co.* v. *Stewart*, 300 U. S. 203, 215; *Dawson* v. *Kentucky Distilleries and Warehouse Co.*, 255 U. S. 288, 296; 1 Pomeroy's Equity Jurisprudence (5th Ed.) Section 279).

CONCLUSION

The decision of the court below is in conflict with the decisions of two Circuit Courts of Appeals. It decides a question of importance to the enforcement and administration of the Emergency Price Control Act. It is clearly wrong. For these reasons a writ of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

JANUARY 1946.

APPENDIX

United States Circuit Court of Appeals, Sixth Circuit

No. 10,018

CHESTER BOWLES, ADMINISTRATOR, APPELLANT

vs.

JOHN K. SKAGGS, JR., ADMINISTRATOR OF THE ESTATE OF JOHN K. SKAGGS, SR., APPELLEE

ON PETITION FOR REHEARING

Before SIMMONS and ALLEN, Circuit Judges; RAYMOND, District Judge.

PER CURIAM: The appellee, by petition for rehearing, seeks a reconsideration of our opinion in the above-entitled cause announced November 12, 1945, wherein we held that the Administrator of the Office of Price Administration was possessed of authority, under § 205 (a) of the Emergency Price Control Act of 1942, not only to seek an injunction to restrain similar violations of the Act but to seek affirmative relief by way of restoring to a purchaser the excess of purchase price over maximum ceiling price of commodities, and wherein we held the court empowered in its discretion to grant such relief.

The rehearing petition is grounded solely upon an opinion of the Eighth Circuit Court of Appeals in *Chester Bowles* v. *Warner Holding Co.*, announced October 31, 1945, which was not available at the time of hearing but which reaches a conclusion in conflict with ours.

We have given careful consideration to the cited case. It bears this distinction from the case at bar: The violations there involved were such as could be repeated and an injunction to prevent repetition might well have been considered adequate to vindicate the mandate of the statute and the regulation. The violation in the instant case was a non-recurrent sale of personal property by the Administrator of an estate engaged in liquidating personal property. Without overemphasizing the importance of this distinction and with the utmost respect for the views of the court which decided the Warner case, we adhere to our conclusions in respect to the authority of the Price Administrator and the power of the court in its discretion to grant the affirmative relief sought in the case at bar. Wherefore, the petition for rehearing is denied.

Enter:

CHARLES C. SIMONS.

Filed December 10, 1945.

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